No. 11,541.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARCELINO C. PINA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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Statement of Facts.

Appellee takes no issue to the facts of the case as stated in Appellant's Opening Brief "Statement of the Case," however, the following additional statement may be helpful.

A government check, namely, "mustering-out pay," was sent to the payee, Felix T. Soto, "1551 E. 118 Pl., Los Angeles 2, Calif." The check was in the amount of $100.00, and was drawn on the Treasurer of the United States. This check was never received by the payee, nor did the payee authorize any person to endorse same.

The accomplice, designated in the record as Raymond T. Rodriguez (otherwise known as Raymond Gilbert Rodriguez), was but seventeen at the time the offense was committed [R. 36]. On or about December 29, 1945, the accomplice, Rodriguez, was in the home of the appellant, Pina, at which time the appellant showed him the

check in question [R. 33]. The appellant asked Rodriguez how he would like the idea of cashing the check [R. 33 and 34]. At first, the accomplice, Rodriguez, did not care to do so, but was persuaded in doing so.

The accomplice, Rodriguez, and the appellant, Pina, then drove in the appellant Pina's car to a check-cashing establishment in Watts, California, which place the defendant had told Rodriguez about. Rodriguez, alone, entered the check-cashing place and there cashed the government check [R. 34, 35]. Rodriguez returned to the car and gave the full $100.00 to Pina, less a service charge of twenty cents made for cashing the check, and received $20.00 from Pina, the appellant Pina keeping the remainder of the money [R. 35 and 39].

The appellant Pina had given a statement to U. S. Secret Service Agent Prescott H. Manning [R. 40-44]. The statement was given on November 24, 1946. According to the testimony of Agent Manning, the appellant Pina admitted his complicity with the accomplice Rodriguez, in securing and cashing this check.

According to the defense witness, Sally Arias, who was more than a close friend of Pina, she, Sally Arias, endorsed or signed the check at the request of Rodriguez [R. 48].

NOTE:

Factual Matter Pertaining to Accomplice Rodriguez Which Does Not Directly Appear in This Record, But Which Is a Matter of Public Record.

The trial took place on January 22, 1947. The date is only material to this case as it bears reference to the accomplice Rodriguez's previous plea and sentence in case

United States v. Rodriguez, No. 19095, which occurred in the same district and division as the trial of this case. While the charge against Rodriguez is not a part of this record, it undoubtedly was known to defendant's counsel and was a matter of public record.

Appellant has referred to the case against Rodriguez, hence appellee deems it proper to do likewise.

The files in the District Clerk's office reveal that the accomplice Rodriguez had, on December 23, 1946, been charged in an Information as a juvenile delinquent with having uttered this same check, pursuant to 18 U. S. C. A., Section 922. The file and record reveal that Rodriguez consented to being prosecuted as a juvenile delinquent, and entered a plea of guilty on December 23, 1946. On January 13, 1947, Rodriguez was sentenced for his complicity. Rodriguez was placed on probation until he reaches the age of twenty-one, one of the conditions being that he make full restitution. The sentence of the accomplice Rodriguez preceded this trial by nine days.

That appellant's counsel was aware of the charge against Rodriguez is at least impliedly borne out by the cross-examination of Rodriguez. This question by defendant's counsel and answer by the accomplice Rodriguez appear in the record [R. 40]:

> "Q. Have you pleaded guilty to the crime of uttering this forged check? A. Yes, sir; I pleaded guilty for my part."

ARGUMENT.

I.

On page 5 of appellant's opening brief, appellant asserts (a) that he was prejudiced by the court's refusal to give his instruction No. 3, pertaining to accomplices, and (b) that the denial of his motion to reopen the case constituted error.

A. The Refusal to Give Defendant's Proposed Instruction No. 3 Was Not Error.

It should be observed that the court gave an instruction defining an accomplice, which included the admonition

> "* * * that such testimony is to be weighed and scrutinized with great care, and that, if it is not corroborated by other competent evidence, it should not be relied upon * * *" [R. 68].

The court also gave what may be termed a standard instruction concering the credibility of witnesses, particularly as follows [R. 71]:

> "* * * You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the government or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his or her credibility."

It is, of course, better practice—and one which we believe was followed in this case—to caution the jury concerning the testimony of an accomplice and of the danger of convicting without supporting evidence.

The courts, however, have held that even the failure to give such a precautionary instruction is not reversible error. That a refusal to give such an instruction is generally discretionary, is supported by the following:

Pine v. United States, 135 F. (2d) 353, at p. 355 (C. C. A. 5th), cert. den. 320 U. S. 740.

The Supreme Court, in affirming an opinion in this circuit, has held that while it is better practice to give such an instruction, that the refusal is not error. See:

Caminetti v. United States, 242 U. S. 470, at p. 495 (aff. *Diggs v. United States,* 220 Fed. 545 [C. C. A. 9th]).

That an instruction somewhat similar to the one given by the trial court is all that is required, see the following:

United States v. Schwartz, 150 F. (2d) 627 (C. C. A. 2d);

United States v. Schanerman, 150 F. (2d) 941 (C. C. A. 3rd).

Upon the proposition that no special instruction need be given when the matter is covered by the general instructions, see:

Grimes v. United States, 151 F. (2d) 417 (C. C. A. 5th);

United States v. Schanerman (*supra*).

See, also, cases noted in:

Federal Digest, Criminal Law Key 829(1) and (10).

This circuit has held in *Meadows v. United States,* in a case pertaining to a charge of forging assignments on Liberty Bonds and uttering same, that the refusal to give accused's requested instructions relating to the credibility of an accomplice's testimony was not error when the matter was fully covered by the charge given.

> *Meadows v. United States,* 11 F. (2d) 718 (C. C. A. 9th); cert. den. 273 U. S. 702.

B. The Denial of the Motion to Reopen the Case Was Not Error.

Commencing on page 5 of Appellant's Opening Brief, he contends that the case should have been reopened so that he might have shown that the accomplice Rodriguez had been placed on probation.

Upon cross-examination, appellant's counsel asked Rodriguez [R. 40]:

> "Q. Have you pleaded guilty to the crime of uttering this forged check?"

to which Rodriguez replied:

> "A. Yes, sir, I pleaded guilty for my part."

Such inquiry presupposes knowledge of the pendency of the like charge against Rodriguez. Counsel did not pursue the matter; although no objection was interposed, he was not restricted. Counsel could have readily made further inquiry, had he seen fit, in an attempt to exhibit motive or bias on the part of the witness Rodriguez.

The sentence imposed on the accomplice Rodriguez, as a juvenile delinquent, was imposed January 13, 1947, or nine days prior to the trial of the instant case. The file and record of that case is and was a public record. (*United States v. Rodriguez,* No. 19095.)

It is submitted that Rodriquez's complicity and admission of joint guilt was clearly brought to the jury's attention.

It should be noted that this motion to reopen the case was not made until after argument [R. 61 and 62].

Appellee submits that the matter of punishment or probation granted with reference to Rodriguez was, at that stage of the proceedings, immaterial. At the trial, no inducement stood over Rodriguez to have motivated him to have testified favorably for the government. His case was closed, he had been placed on probation.

The court's ruling was one entirely within his discretion.

II.

Evidence of an Intent to Defraud the United States Was Sufficient.

Answering appellant's contention commencing on page 6 (Opening Brief), designated under heading "II," appellant contends that the evidence of an intent to defraud the United States was insufficient. It is to be noted that the indictment charges the check was uttered "with intent to defraud the United States" [R. 4].

Appellant appears to argue that the government must sustain some pecuniary loss. The authorities are adverse to appellant's contention.

We have read all the cases cited by appellant and submit that they are not controlling, if even to point as to this charge.

Before discussing the authorities, we call attention that in addition to the statute under which this indictment was brought, namely, 18 U. S. C. A., Section 73, there is also the companion section of 18 U. S. C. A., Section 72.

For all practical purposes, these companion sections are substantially alike so far as the instant charge is concerned; they both denounce the uttering as true, or causing to be uttered as true, of certain described forged instruments and "other writings," with the intent to defraud the United States. The opinions often refer to both sections and draw parallel conclusions.

18 U. S. C. A., Section 72, is also known as Section 28 of the Criminal Code; 18 U. S. C. A., Section 73, is also known as Section 29 of the Criminal Code.

This circuit held (June, 1943) that a forged physician's prescription for narcotics would fall within the meaning

of the phrase "other writings," and further held that in uttering such a forged writing, it is not necessary to prove that the government would thereby suffer a pecuniary loss. In the material quoted hereunder, this court also refers to the companion section under which this indictment was brought, namely, 18 U. S. C. A., Section 73.

Johnson v. Warden, 134 F. (2d) 166 (C. C. A. 9th); cert. den. 319 U. S. 763.

"Section 28 of the Criminal Code makes it an offense for any person to 'utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any * * * false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States * * *.' We entertain no doubt that a forged physician's prescription for narcotics falls within the meaning of the phrase 'other writing' as used in that statute. It was said in Prussian v. United States, 282 U. S. 675, 51 S. Ct. 223, 75 L. Ed. 610, that the words 'other writing' as used in a companion statute, §29 of the Criminal Code, 18 U. S. C. A., §73, were included for the purpose of extending the penal provisions of the statute to all writings of every class if forged for the purpose of defrauding the United States.

"It is well settled that in order to establish a purpose to defraud the United States, within the contemplation of §28 of the Criminal Code, it is not necessary to prove that the government would thereby suffer a pecuniary loss. It is enough that the unlawful activity be engaged in for the purpose of frustrating the administration of a statute, or that

it tends to impair a governmental function. By 26 U. S. C. A., Internal Revenue Code, §2554, it is made unlawful for any person to sell or give away any narcotic drugs except in named circumstances, one of which is upon prescription issued by a registered physician, dentist, or veterinary surgeon. It is obvious that the utterance of a forged prescription tends directly to frustrate the laws of the United States relating to the dispensing of narcotics."

In the case of *Head v. Hunter,* hereunder noted, the appellant, an Indian, and a codefendant were indicted for changing the name of a certain designated person in a permit. The permit was issued by an authorized official of the government and authorized a named person to sell one Hereford cowhide. The court held that the indictment did not fail to charge a crime on the theory that the intent was to defraud a private citizen.

Head v. Hunter, 141 F. (2d) 449, at p. 451 (C. C. A. 10th).

"It is further contended that the forging or altering of the permit, as set forth in the indictment, did not encompass a purpose to defraud the United States, which is an essential ingredient of the statutory offense. Rather it is argued that it was not the intention of the parties to defraud the United States of any money or property, but to defraud a private citizen. It is true that the indictment does not charge the United States suffered a pecuniary loss, but a pecuniary loss to the government is not prerequisite to the crime of defrauding the United States. It is enough if the acts charged frustrate the administration of a statute or tend to impair or impede a governmental function. Cross v. North Carolina, *supra*; Hammerschmidt v. United States, 265 U. S. 182, 44 S. Ct. 511, 68 L. Ed. 968; United States

v. Tynan, *supra;* Falter v. United States, 2 Cir., 23 F. 2d 420; Miller v. United States, 2 Cir., 24 F. 2d 353; Goldsmith v. United States, 2 Cir., 42 F. 2d 133; United States v. Goldsmith, 2 Cir., 68 F. 2d 5; Johnson v. Warden, *supra.* The permit described in the indictment was an instrument issued by an official of the United States Government in the performance of his official duties and it is charged that this instrument was forged, altered and changed for the purpose of defrauding the United States. It follows that if a statute of the United States was thereby frustrated, or a governmental function impeded or impaired, the requirements of the criminal statute are satisfied. The appellant entered a plea of guilty and any questions of fact are thereby foreclosed."

With respect to a charge of defrauding the United States by uttering a forged writing, predicated under 18 U. S. C., Section 72, which writing purported to be an Internal Revenue Collector's authorized receipt for payment of taxes, the court, in

United States v. Goldsmith, 68 F. (2d) 5, at p. 7 (C. C. A. 2d)

stated as follows:

"* * * It is true that the acts complained of could not defraud the United States in the sense of resulting in a pecuniary loss to it. No money belonging to the United States was taken from it, nor was it deprived of the right to collect the tax which was due. But it is clearly established that, to defraud the United States, pecuniary loss is not necessary; any impairment of the administration of its governmental functions will suffice. Hass v. Henkel, 216 U. S. 462, 480, 30 S. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; United States v. Plyler, 222 U. S. 15, 32

S. Ct. 6, 56 L. Ed. 70; Goldsmith v. United States, 42 F. (2d) 133 (C. C. A. 2); United States v. Tynan, 6 F. (2d) 668 (D. C. S. D. N. Y.); Curley v. United States, 130 F. 1 (C. C. A. 1). An intent to defraud the United States in the exercise of its governmental powers is alleged. We cannot say that the forged receipt could not possibly operate to the prejudice of the United States in respect to collection of the tax. It was in a form and on paper officially printed."

In the case of

Prussian v. United States, 282 U. S. 675,

the Supreme Court held (pp. 679-80), in construing Section 29 of the Criminal Code, that an indictment charging a forgery of an endorsement on a government draft, for the purpose of obtaining and receiving money from an officer of the United States, on whom it was drawn, need not allege an intent to defraud the United States. The court further held that such a charge "imports an intent to defraud the United States."

Additional cases upon the broad proposition that no pecuniary loss need be sustained by the government, are the often cited cases noted below:

Haas v. Henkel, 216 U. S. 462, at p. 479;

Hammerschmidt v. United States, 265 U. S. 182, at p. 188.

That a government check, the forging of the endorsement and uttering thereof, is covered by the statute, see:

De Maurez v. Squier, Warden, 144 F. (2d) 564 (C. C. A. 9th), cert. den. 323 U. S. 762;

Buckner v. Aderhold, Warden, 73 F. (2d) 255 (C. C. A. 5th).

Conclusion.

It is therefore respectfully submitted that the verdict and judgment of conviction should be affirmed.

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